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Chapter 7 Trustee

UNITED STATES BANKRUPTCY COURT  
District of Nevada

In re

MARY LOU BARNUM

Debtor.

CASE NO. BK-S-12-19836-BAM

Chapter 7

**OBJECTION TO DEBTOR'S CLAIM OF  
EXEMPTION AND MOTION FOR  
TURNOVER**

Date: May 16, 2013

Time: 11:00 a.m.

Ctrm: 3

Foley Federal Building  
300 Las Vegas Blvd. So.  
Las Vegas, NV 89101

Judge: Hon. Bruce A. Markell

Yvette Weinstein ("Trustee"), by her attorney, Elizabeth E. Stephens, Esq. of Sullivan, Hill, Lewin, Rez & Engel, hereby objects to the Debtor's claim of exemption pursuant to 11 U.S.C. § 522, Fed. R. Bankr. P. 1019(2)(b) and 4003, and moves the Court for turnover of property of the Estate pursuant to 11 U.S.C. §542 ("Objection and Motion").

This Objection and Motion are based upon the attached memorandum of points and authorities, all the papers and files of record, and any oral argument this Court may wish to hear.

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1 **POINTS AND AUTHORITIES**

2 **I.**

3 **BACKGROUND**

4 Mary Lou Barnum ("Debtor") filed for bankruptcy protection under Chapter 13 of the  
5 Bankruptcy Code on August 24, 2012. The case was converted to a Chapter 7 proceeding on  
6 December 19, 2012. Yvette Weinstein was appointed Trustee and has served in that capacity ever  
7 since. (*See* the Declaration of Yvette Weinstein). Debtor was married, but her spouse, George  
8 Barnum ("Spouse"), did not file for bankruptcy protection with her.

9 On the schedules filed on August 24, 2012 [Dkt. #1], the Debtor listed two vehicles on  
10 Schedule B-25 (*See* the Declaration of Yvette Weinstein, Exhibit "1"): a 1999 Nissan Quest  
11 ("Nissan") valued at \$3,500, and a 2004 Toyota Avalon ("Toyota") valued at \$8,141. On Schedule  
12 C Debtor claimed as exempt the \$3,500 of value in the 1999 Nissan under N.R.S. 21.090(1)(z) and  
13 also claimed exemption of the equity in the amount of \$8,141 for the 2004 Toyota under N.R.S.  
14 21.040(1)(f). (*See* Declaration of Yvette Weinstein, Exhibit 1 at 16).

15 On the amended schedules filed after conversion [Dkt. #44], the Debtor listed the same two  
16 vehicles on schedule B-25: the 1999 Nissan valued at \$1,650 on schedule B, but valued at \$3,500 on  
17 schedule C and the 2004 Toyota valued at \$8,141. On schedule C the Debtor claimed the 1999  
18 Nissan exempt in the amount of "0" pursuant to pursuant to N.R.S. 21.090(1)(z) and the \$8,141  
19 value in the 2004 Toyota exempt pursuant to N.R.S. 21.090(1)(f). (*See* the Declaration of Yvette  
20 Weinstein, Exhibit "2"):

21 At a continued 341(a) meeting on March 13, 2013, the Debtor's counsel explained that,  
22 despite the schedules, the Debtor was claiming the 1999 Nissan exempt pursuant to N.R.S.  
23 21.090(1)(f). The Trustee believes that under Nevada law one of the vehicles is exempt and one of  
24 them is nonexempt and seeks turnover of the nonexempt vehicle or its equivalent value.

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## II.

LEGAL ARGUMENTA. The Community Property of Debtor and His Non-filing Spouse Became Property of the Estate on the Date of Filing the Bankruptcy Petition.

All the interests of a debtor and a debtor's spouse in community property become property of the bankruptcy estate pursuant to section 541(a)(2) of the Bankruptcy Code (11 U.S.C. § 101, *et seq.*). The purpose of section 541(a)(2) is to bring into the estate all property, which would be available for satisfaction of debt to creditors of the debtor. Under state law, creditors of the non-debtor spouse may also look to community property for satisfaction of their claims and consequently they are allowed to participate in the distribution of bankruptcy estate assets as well.<sup>1</sup> As a practical matter, the only property that is not included in the bankruptcy estate is the separate property of the non-debtor spouse. 5 Collier on Bankruptcy ¶ 541.11[2] (16th ed. 2011). The result is not new; it has been this way since the passage of the Bankruptcy Act of 1898. *Teel v. Teel (In re Teel)*, 34 B.R. 762, 764 (9th Cir. BAP 1983).

When a married debtor files for bankruptcy protection, the property of the estate includes:

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

11 U.S.C. § 541(a)(2). The Ninth Circuit has concluded that all community property not yet divided by a state court at the time of filing is property of the bankruptcy estate. *Dumas v. Mantle (In re Mantle)*, 153 F.3d 1082, 1085 (9th Cir. 1998).

Of course "community property" is not defined in the Bankruptcy Code, but is determined by reference to state law. *Butner v. United States*, 440 U.S. 48, 55 (1979). In Nevada, all property

<sup>1</sup> 11 U.S.C. §101(7) defines "community claim." 11 U.S.C. § 101(10) defines creditor as, *inter alia*, an "entity that has a community claim." 11 U.S.C. §342(a) requires that the creditors of the non-debtor spouse must receive notice of the bankruptcy filing.

acquired after marriage is presumed to be community property and all debts incurred are presumed to be community debts. *Kelly v. Kelly*, 86 Nev. 301, 309, 468 P.2d 359, 364 (1970); *see also* Nev. Rev. Stat. 123.220 *et seq.* The presumption can be rebutted by clear and convincing evidence. *Waldman v. Maini*, 124 Nev. 1121, 1128, 195 P.3d 850, 855 (2008); *Norwest Fin. v. Lawver*, 109 Nev. 242, 245, 849 P.2d 324, 326 (1993). Absent a divorce, the community property becomes property of the bankruptcy estate. *Keller v. Keller (In re Keller)*, 185 B.R. 796, 799 (9th Cir. 1995 BAP). When a debtor petitions for protection under the Bankruptcy Code before a final disposition of property, “the community property comes within the jurisdiction of the bankruptcy court . . . .” *Keller*, 185 B.R. at 800; *see also Birdsell v. Peterson (In re Petersen)*, 437 B.R. 858, 866 (D. Ariz. 2010).

During marriage, the interests of a husband and wife in community property “are present, existing and equal interests” under Nevada law. Nev. Rev. Stat. 123.225. While Nev. Rev. Stat. 123.230 provides that “either spouse, acting alone, may manage and control community property,” it includes a list of exceptions. N.R.S. 123.230 (1-6). Applicable Nevada law, thus, in actuality gives the spouses joint control of community property. *Soper v. Crystal Palace Gambling Hall, Inc. (In re Crystal Palace Gambling Hall, Inc.)*, 36, B.R. 947, 950 (9th Cir. BAP 1984). *Cf., In Re Perez*, 302 B.R. 661, 663-64 (Bankr. D. Ariz. 2003). (Under Arizona law [apparently] either spouse has the unlimited ability to act for the benefit of the community.)

A non-debtor spouse in Nevada, and all community property states, benefits from the discharge of the debtor. Property acquired after the bankruptcy case is filed is protected from pre-petition claims by the discharge injunction section 524(a)(3) of the Bankruptcy Code. *Rooz v. Kimmel (In re Kimmel)*, 378 B.R. 630, 635 (9th Cir. BAP 2007); *Burman v. Homan (In re Homan)*, 112 B.R. 356, 360 (9th Cir. BAP 1989); *see also, Lawver*, 109 Nev. at 244-45, 849 P.2d at 325.

**B. There is No Basis Under Nevada State Law For a Claim of Exemption By a Non-Debtor Spouse**

**1. The Spouse is Not a Judgment Debtor and Lacked Standing to Claim an Exemption Under Nevada Law.**

The Nevada exemption statute provides as relevant to this case:

1 21.090. Property exempt from execution

2 1. The following property is exempt from execution, except as  
3 otherwise specifically provided in this section or required by federal  
4 law:

5 . . .

6 (f) Except as otherwise provided in paragraph (p), one vehicle if the  
7 judgment debtor's equity does not exceed \$15,000 or the creditor is  
8 paid an amount equal to any excess above that equity.

9 Nev. Rev. Stat. 21.090 (2011). The relevant paragraph of Nev. Rev. Stat. 21.090  
10 (2011) refer to exempt property of the "judgment debtor".

11 When interpreting a statute, Nevada courts look first to the plain language of the statute and  
12 ascribe to words their plain meaning. *Savage v. Pierson*, 123 Nev. 86, 89, 157 P.3d 697, 699 (2007).  
13 Further, an undefined statutory phrase is construed according to its plain and ordinary meaning. *In*  
14 *re Resort at Summerlin Litig.*, 122 Nev. 177, 182, 127 P.3d 1076, 1079 (2006). The court need not  
15 look beyond the plain meaning of the statute, unless the language is ambiguous. *Id.*

16 The plain meaning of "judgment debtor" is "[a] person against whom a money judgment has  
17 been entered but not yet satisfied." Black's Law Dictionary 9th ed. 2009); *Accord, Nat'l Mines Co.*  
18 *v. Sixth Judicial Dist. Court for the County of Humboldt*, 34 Nev. 67, 116 P. 996, 1001 (1911) ("A  
19 judgment debtor must, before he can become such, be a party to an action"). There was no disclosed  
20 judgment against the nonfiling spouse.

21 Moreover, inherent in the nature of a bankruptcy exemption is the requirement that property  
22 must be exempt from execution. "The rights of a bankrupt to property as exempt are those given  
23 him by the state statutes, and if such exempt property is not subject to levy and sale under these  
24 statutes, then it cannot be made to respond under the act of Congress." *Smalley v. Laugenour*, 196  
25 U.S. 93, 97 (1905). Further, a state exemption statute that restricts only the trustee in bankruptcy  
26 from recovering assets is not the type of exemption Congress recognizes in bankruptcy; it would be  
27 unconstitutional. *Kanter v. Moneymaker (In re Kanter)*, 505 F. 2d 228, 230 (9th Cir. 1974).  
28 Because it is well established that Nev. Rev. Stat. 21.090 (2011) *et. seq.* established a valid

1 bankruptcy exemption scheme, it must apply under state law to all judgment debtors. Therefore, in  
2 order to claim the state law exemption one must be a judgment debtor or a debtor in bankruptcy.

3 **2. The Debtor Could Not Claim the Automobile and “Wild Card” Exemption on**  
4 **Behalf of His Spouse Under Nevada State Law.**

5 It is noteworthy that certain exemptions allow “the judgment debtor” to exempt property  
6 belonging to a “dependent.” *See, e.g.*, Nev. Rev. Stat. 21.090(1)(a) (2011) (works of arts, private  
7 libraries, and jewelry); Nev. Rev. Stat. 21.090(1)(b) (2011) (household goods); Nev. Rev. Stat.  
8 21.090(1)(p) (2011) (handicapped equipped vehicles); Nev. Rev. Stat. 21.090(1)(u) (2011) (personal  
9 injury); Nev. Rev. Stat. 21.090(1)(w) (2011) (loss of future earnings). These exemptions are  
10 personal to the debtor, but allow the debtor to protect property of dependents or one upon whom the  
11 debtor is dependent. However, neither the vehicle exemption nor the “wild card” exemption applies  
12 to a dependent’s property.

13 Pursuant to Nev. Rev. Stat. 21.090 (1)(f) (2011), a debtor may exempt “one vehicle if the  
14 judgment debtor’s equity does not exceed \$15,000 or the creditor is paid an amount equal to any  
15 excess above that equity.” Under the statute a debtor is limited to exemption of one vehicle. “The  
16 only limiting language (other than the maximum amount of the exemption) is that the debtor is  
17 precluded from exempting equity in more than one car.” *In re Longmore*, 273 B.R. 633, 635 (Bankr.  
18 D. Nev. 2001). The Debtor claimed exemptions in two vehicles, contrary to the plain meaning of the  
19 statute.

20 **C. The Non-Debtor Spouse Had No Standing to Claim Exemptions Under Federal**  
21 **Bankruptcy Law**

22 The spouse was not a bankruptcy debtor. Only debtors may claim exemptions under federal  
23 bankruptcy law. Therefore, the Debtor’s spouse had no standing to claim exemptions in the  
24 Debtor’s bankruptcy case.

25 Nevada has opted out of the federal exemption scheme, 11 U.S.C. § 522(d), only the  
26 exemptions allowed under Nevada law. *In re Richards*, 57 B.R. 662, 664 (Bankr. D. Nev. 1986). In  
27 the absence of controlling federal law, property and interests in property are creatures of state law.  
28 *Butner v. United States*, 440 U.S. 48, 54-55 (1979). However, the application of state law may only



1 occur when the state law is not inconsistent with federal law. *Butner*, 55. When state law conflicts  
 2 with, or hinders the policies of federal law, the bankruptcy court may not apply it. *Torres v. Eastlick*  
 3 (*In re N. Am. Coin & Currency, Ltd.*), 767 F.2d 1573, 1575 (9th Cir. 1985).

4 State law which directly conflicts with federal law governing the same issue is preempted by  
 5 the federal law. U.S. Const. art. VI, cl. 2. Thus, even when a state has opted out of the exemption  
 6 scheme allowed under 11 U.S.C. § 522(d), the remaining subsections of section 522 continue in  
 7 effect and apply to the debtor and his case. 11 U.S.C. § 522(a)-(q); *In re Soby*, 37 B.R. 522, 524  
 8 (Bankr. D. Minn. 1984). To the extent state law conflicts with the Bankruptcy Code, state law must  
 9 yield. *In re Stevens*, 374 B.R. 31, 34 (Bankr. D.N.H. 2007); *Keeler v. PRA Receivables Mgmt, LLC*  
 10 (*In re Keeler*), 440 B.R. 354, 367 (Bankr. E.D. Pa. 2009). To the extent there is any conflict  
 11 between state law and the Bankruptcy Code regarding community property, the Bankruptcy Code  
 12 will control. *Teel v. Teel (In re Teel)*, 34 B.R. 762, 764 (9th Cir. BAP1983).

13 Spouses can file a joint bankruptcy case. 11 U.S.C. § 302. Spouses who file jointly pursuant  
 14 to section 302 may each claim exemptions in the bankruptcy case. 11 U.S.C. § 522(b). Also, if a  
 15 debtor filing alone does not claim exempt property of the estate, a dependent, including a non-filing  
 16 spouse, may file a list of exemptions. 11 U.S.C. § 522(l).

17 However, the Ninth Circuit Bankruptcy Appellate Panel has held that if the debtor claims  
 18 exemptions in property, the non-filing spouse may not do so. The non-debtor spouse has no right to  
 19 claim an exemption in the debtor's case under those circumstances. *Burman v. Homan (In re*  
 20 *Homan)*, 112 B.R. 356, 359-60 (9th Cir. BAP 1989). *See also, In re DeHaan*, 275 B.R. 375, 380-81  
 21 (Bankr. D. Idaho 2002); *In re Pixler*, No. 01-03131, 2002 WL 33939734, slip op. at 3 (Bankr. D.  
 22 Idaho April 5, 2002). *Accord, In re Victor*, 341 B.R. 775, 781 (Bankr. D.N.M. 2006); *In re*  
 23 *Rodriguez*, 353 B.R. 144,149 (Bankr. N.D. Tex. 2006).

24 There is nothing in the Bankruptcy Code, or case law, which hints that a debtor might be able  
 25 to assert two sets of exemptions in an individual filing. *In re Wald*, No. 11-53644, 2012 WL  
 26 2049429 (Bankr. W.D. Tex June 6, 2012) (*citing* 1-4 Collier Family law and the Bankruptcy Code ¶  
 27 4.04 (2010)). The *Homan* case was all about the capacity of a non-filing spouse to exempt  
 28 community property. *Burman v. Homan (In re Homan)*, 112 B.R. 356, 359-61 (9th Cir. BAP 1989).

1 The filing by a spouse as an individual creates an estate encompassing all community property. The  
2 right to claim exemptions rests solely in the filing spouse. 11 U.S.C. § 522(b); *Homan*, 359.

3 In *Homan*, the entry of property into his bankruptcy estate gave the debtor the exclusive right  
4 to claim exemptions. *Id.* at 359. The court noted that the only exception to the rule was provided in  
5 section 522(l) of the Bankruptcy Code which permitted a non-debtor spouse to declare exemptions  
6 as a dependent of the debtor. *Homan*, 359. But there was nothing to suggest that once a list was  
7 filed it could be supplemented. *Id.* In *Homan*, the non-filing spouse was attempting to protect  
8 additional nonexempt property, as is the non-filing spouse in this case.

9 In the *DeHaan* case, the debtor contended, as does the Debtor in this case, that he was  
10 entitled to assert exemptions in vehicles and household goods on behalf of his non-filing spouse. 275  
11 B.R. at 377. The court rejected his contention. Beginning with the *Homan* analysis, the *DeHaan*  
12 court found that sections 541 and 522 of the Bankruptcy Code were sufficiently clear. The non-  
13 debtor spouse was simply a dependent of the debtor within those provisions. *DeHaan*, 381; *Homan*,  
14 360. Nothing in the Bankruptcy Code allowed non-debtors to assert their personal exemptions, nor  
15 could the debtor assert an exemption belonging to non-debtor dependents. *DeHaan*, 381. *Accord*, *In*  
16 *re Victor*, 341 B.R. 775, 781 (Bankr. D.N.M. 2006). *Kapila v. Morgan (In re Morgan)*, 286 B.R.  
17 678, 683 (Bankr. E.D. Wis. 2002); *In re Page*, 171 B.R. 349, 352 (Bankr. W.D. Wis. 1994), *contra*  
18 *In re Perez* 302 B.R. 661, 663 (Bankr. D. Ariz. 2003).

19 In *In re Pixler* No. 01-03131, 2002 WL 33939734, slip op. (Bankr. D. Idaho April 5, 2002),  
20 the debtor filed her separate bankruptcy on the same day, but a few minutes later, than her estranged  
21 husband. She attempted to exempt her automobile in her bankruptcy case. The court pointed out  
22 that the two spouses could have filed jointly under section 302 (a) of the Bankruptcy Code and each  
23 would have been allowed separate claims of exemption pursuant to section 522(m) and (b)(2)(A) of  
24 the Bankruptcy Code. *Pixler*, 2.

25 However, the court continued, the Bankruptcy Code vested all of the undivided community  
26 property in the estate of the first debtor spouse to file. *Id.* at 3. The debtor could not claim the  
27 exemption in her spouse's earlier filed bankruptcy. *Id.* Further, she could not claim the exemption  
28 in her own bankruptcy because all her rights and title in the vehicle passed into her spouse's



1 bankruptcy estate. *Id.* Therefore, the debtor was unable to exempt her vehicle. Clearly, there was a  
2 failure of pre bankruptcy planning in the *Pixler* case.

3 In *Homan* the court noted that the congressional intent behind section 522(b) of the  
4 Bankruptcy Code was to encourage spouses to file jointly. *Homan*, 112 B.R. at 360. Moreover,  
5 what appeared to be a harsh result was offset by other code provisions. *Id.* For example, the non-  
6 debtor spouse has the right of first refusal to purchase property at the proposed sale price pursuant to  
7 section 363(i). *Homan*, 360.

8 More importantly, the non-debtor spouse receives the benefits of the debtor's discharge  
9 because after acquired property is protected by the community property permanent injunction,  
10 section 524(a)(3) of the Bankruptcy Code. *Id.*; *Accord Pixler*, 2002 WL 33939734 at 3; *Vizcaya*  
11 *Argentaria v. Wiscovitch-Rentas*, No. 08-2323 (GAG), 2009 WL 1309687, slip op. (D.P.R. May 8,  
12 2009); *In re Rodriguez*, 353 B.R. 144, 149 (Bankr. N.D. Tex. 2006); *Norwest Fin. v. Lawver*, 109  
13 Nev. 242, 244, 849 P. 2d 324, 325 (1993).

14 In *Rooz v. Kimmel (In re Kimmel)*, 378 B.R. 630 (9th Cir. BAP 2007), the BAP confirmed  
15 the dicta in *Homan* that section 524(a)(3) "can operate to provide non-debtor spouses with a de facto  
16 partial discharge of their separate debts by enjoining a creditor from attaching community property  
17 in which the non-debtor spouse has an interest . . . ." *Rooz*, 636. As a corollary to section 541(a)(2)  
18 of the Bankruptcy Code, a creditor is defined, among other things, as an "entity that has a  
19 community claim." 11 U.S.C. §101(10)(c). Pursuant to section 101(7) of the Bankruptcy Code, a  
20 "community claim" is one "that arose before the commencement of the case concerning the debtor  
21 for which the property of the kind specified in section 541(a)(2) of this title is liable, whether or not  
22 there is any such property at the time of the commencement of the case." Moreover, the non-debtor  
23 spouse is required to provide contact information for notice to the non-filing spouse's creditors about  
24 the debtor's bankruptcy and potential distribution. 11 U.S.C. § 342(a).

25 In other words, community assets pay community debts. As a consequence, upon discharge  
26 of the debtor, the community claims are diminished, which inures to the benefit of the non-filing  
27 spouse. Claims against after acquired community property are also enjoined. 11 U.S.C. § 524(a)(3);  
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1 *Kimmel*, 378 B.R. at 635-37. Thus, a non-debtor spouse in a community property state usually  
2 benefits from the discharge of the debtor spouse.

3 Another aspect of the section 524(a)(3) benefit to a non-filing spouse was explored in *In re*  
4 *Field*, 440 B.R. 191 (Bankr. D. Nev. 2009). In *Field*, the debtor filed a chapter 13 case. Her non-  
5 filing spouse had premarital tax debt. The IRS filed a claim in the debtor's bankruptcy for the non-  
6 filing spouse's debt.

7 The debtor objected to the IRS claim. The court overruled the debtor's objection. *Id.* at 197.  
8 The court's analysis began with noting the joint control over community property accorded to  
9 spouses under Nevada law under N.R.S. 123.225 and 123.230 (2011). *Field*, 195. Further, all  
10 community property became property of the estate upon filing. The court said Nevada law treated  
11 debts and other obligations the same way it treated community property. *Id.*

12 Premarital debts did not transmute to community debts. *Id.* However, while the debtor's  
13 interest in the community property was not subject to the premarital tax claim, her spouse's interest  
14 in the community property was subject to the tax claim. *Id.* As a result, even though the debtor was  
15 not individually liable for the tax claim, her husband's share of the community property, which  
16 became property of the bankruptcy estate was liable. *Id.* at 196. The IRS claim was, thus, allowed.  
17 *Id.*

18 The good news for the debtor's non-filing spouse was that if the debtor completed her plan  
19 payments and received a discharge, the IRS claim would be impaired. *Id.* The effect of the  
20 permanent injunction was that all the after acquired community property was protected from the IRS  
21 claim by the discharge injunction. The payments received under the debtor's plan would be the only  
22 payments the IRS would ever receive. *Id.* at 197.

23 Some of the best articulations of the interrelation between federal bankruptcy law,  
24 community property law, and bankruptcy exemptions have issued from the bankruptcy courts in  
25 Wisconsin. See, generally, Margaret Dee McGarity, *Community Property in Bankruptcy: Laws on*  
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27  
28

1 *Unintended Consequences*, 72 La. L. Rev. 143 (2011). Wisconsin is one of the ten community  
2 property states.<sup>2</sup>

3 In the Wisconsin cases, the trustees attempted to argue that the debtors could not exempt the  
4 non-debtor spouse's interest in community property, which entered the estate. In *In re Griffith*, 449  
5 B.R. 909 (Bankr. W.D. Wis. 2011) for example, the debtor claimed the entire equity in her home, the  
6 equity in a Dodge Stratus and the equity in a Silverado as exempt, variously under the homestead  
7 exemption, the vehicle exemption and the wildcard exemption. There was no question that the  
8 amounts were well within the allowed exemption values. Under Wisconsin law, both the debtor and  
9 her husband owned an undivided one half interest in the marital property. The trustee contended that  
10 although the entire property came into the estate, the debtor could only assert an exemption on the  
11 debtor's 50 percent interest. *Id.* at 910.

12 The court rejected the trustee's contention and concluded that "because each spouse has an  
13 undivided interest in the whole and the asset in question cannot be divided, it is 'reasonable' to allow  
14 one debtor to claim an exemption in the whole." *Id.* at 911. Further, the court quoted a section from  
15 *In re Passmore*, 156 B.R. 595 (Bankr. E.D. Wis. 1993) explaining that:

16 A spouse owns an undivided one-half interest in all assets and funds  
17 classified as marital property. The debtor does not own one-half of the  
18 postpetition garnished funds; he owns an undivided interest in *all* such  
19 funds. His interest cannot be partitioned by a creditor nor unilaterally  
severed by a spouse . . . . Community property interest in a single asset  
or category of funds simply cannot be severed or treated separately in  
the bankruptcy context.

20 *Griffith*, 911 (quoting *Passmore*, 599); *Accord*, *In re Vanderhei*, 449 B.R. 359, 360-62 (Bankr. W.D.  
21 Wis. 2011); *In re Xiong*, No. 05-43121-SVK, 2006 WL 1277129, slip op. at 3 (Bankr. E.D. Wis.  
22 May 3, 2006). All of the community property, therefore, was subject to the debtor's claim of  
23 exemption, but only to the debtor's claim of exemption.

24 While state law may determine the substance of a state law exemption in an opt out state, the  
25 application of the exemption in a bankruptcy case is determined by federal law. The concept that  
26 only an individual debtor may exempt property of the estate is so well established that it generally

27  
28 <sup>2</sup> The other community property states, besides Nevada, are Alaska, Arizona, California, Idaho, Louisiana, New Mexico, Texas and Washington.

evades analysis. 11 U.S.C. §522(b); *Rodriguez*, 353 B.R. at 149; *McGarity*, 72 La. L. Rev. at 157 (“If the debtor has a non-filing spouse, the spouse who is not a bankruptcy debtor cannot claim an asset exempt.”) In a Ninth Circuit BAP case, the court had occasion to address the issue from the flipside:

While only Steward [Husband] would have been able to claim exemptions in the Property had he been the only debtor, upon Morris’ [Wife] filing of her chapter 7 petition and the bankruptcy court’s administrative consolidation of the bankruptcy cases, Morris and Steward jointly had a right to claim an exemption in the property. Therefore, Morris does have an interest in the Property and has the right to claim an exemption in the Property.

*Flinn v. Morris (In re Steward)*, 227 B.R. 895, 899 (9th Cir. BAP 1998). Only when both spouses file for bankruptcy protection jointly may they each claim exemptions in community property, which is property of the estate.

### III.

#### CONCLUSION

While all community property enters the bankruptcy estate pursuant to Section 541(a)(2), only a debtor may claim exemptions pursuant to the Bankruptcy Code. Under Nevada law, only a “judgment debtor” may claim exemptions from execution by a judgment creditor pursuant to N.R.S. 21.090 *et. seq.* Furthermore, under Nevada law, a judgment debtor may claim certain exemptions on behalf of dependents up to a limited dollar amount. However, the Nevada judgment debtor may not claim property of dependents exempt under the automobile or exemption. Further, a bankruptcy debtor may only claim one set of exemptions. The non-debtor spouse in this case was neither a judgment debtor, nor a bankruptcy debtor.

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1 WHEREFORE, Trustee, Yvette Weinstein, respectfully asks this Court to sustain her  
2 objection to claim of exemption and for turnover of the vehicle or its value to the Trustee and for  
3 such other relief as this Court deems necessary.

4 Dated: April 12, 2013

SULLIVAN, HILL, LEWIN, REZ & ENGEL  
A Professional Law Corporation

5  
6 By: /s/ Elizabeth E. Stephens  
7 Elizabeth E. Stephens, Esq.  
8 Attorneys for Yvette Weinstein,  
9 Chapter 7 Trustee  
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